



Planning Department

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MEMORANDUM

To: Planning Board **Date:** September 8, 2005
From: Roland Bartl, AICP, Town Planner *R.B.*
Subject: Ellsworth Village – Alternatives to Flagg Road Water Main

At the August meeting you asked that staff explore alternatives to the Flagg Road Water Main.

Conditions 3.2.27 & 3.2.28 of the Ellsworth Village Special Permit read:

The proposed pathway from the Site to Brookside Shops on Town-owned land, or any variation thereof, shall not be constructed.

Instead, and subject to the approval by the Acton Water District and the issuance of a Town of Acton permit for construction in a public way, the applicant shall install a water main on Flagg Road. The Board reserves the right to waive this requirement without further public notice, if the Applicant can prove to the Board's reasonable satisfaction that the cost of the water main installation on Flagg Road exceeds the cost of the pathway to Brookside Shops as proposed by a factor of 1.25. Pavement patching of the trench shall follow the "grind and inlay method" required under section 3.1.7 above.

The developer has provided price quotes that peg the cost of the water main at 1.98 times or more than the cost of the pathway. Presumably, the alternative should be more in line with the cost of the pathway to Brookside Shops. I have considered your request. Here are my thoughts:

- Off-site improvements must be related to project mitigation and the proponent's project must at least in part benefit from such improvements (50% or more is a good rule) – the rational nexus test of the Supreme Court.
- The cost of off-site improvements must be related to project impacts and in scale with project size and scope - - the Supreme Court's proportionality test.
- The Board rejected a mitigation project that the developer had previously offered (the pathway) because it was a bit impractical in the absence of detailed plans for the abutting Town property where it was to be located. The proposal met the rational nexus test (pedestrian amenities/connectivity to shopping areas from the project/vehicle trip reduction), and the developer clearly thought of it as proportional since he had proposed it himself.
- In hindsight, the selection of the Flagg Road water main as a replacement project did not really meet the rational nexus test because there would have been no benefit resulting to the project. The cost cap in the decision sought to ensure proportionality.
- Looking for yet other alternatives, I was struck by the absence of possibilities that would meet both the proportionality and rational nexus tests, especially the latter. I take this as a

warning signal not to overreach here. One possibility, a sidewalk on the west-side of Pope Road from Brabrook into East Acton Village had been discarded during the special permit hearing process in light of yet more tree removals that would become necessary. It is hardly appropriate to resurrect it now.

- Government actions must be reasonable, fair, and predictable. To that end there must be finality to its decisions. They should not be changed or amended without evidence of changed or changing circumstances. The decision has clearly defined at which point the cost of the water main installation would lose its proportionality. The developer has demonstrated to our satisfaction that the cost of the water main exceeds that of the pathway by a larger margin than the decision allowed. Therefore, the water main will not be installed. The decision did not identify other alternatives. Searching other alternatives is outside the scope of the decision.

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